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No. 86-1548

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

NORTHWEST AIRLINES, INC.,
Petitioner,

v.

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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SUPPLEMENTAL BRIEF IN SUPPORT OF THE PETITION

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TABLE OF AUTHORITIES

Cases Page

Hyde Park Community Hospital v. Allied Services Division, (N.D. Ill. Dec. 23, 1987, No. 87 C 1315 LEXIS) 3, 4

Iowa Electric Light and Power Co. v. Local Union 204, Int'l Brotherhood of Electrical Workers, 834 F.2d 1424 (8th Cir. 1987) 3, 4, 6

S.D. Warren Co. v. United Paperworkers' Int'l Union, (1st Cir. Apr. 21, 1988, No. 86-1405 LEXIS) 2

Stead Motors of Walnut Creek v. Automobile Machinists Lodge No. 1173, Int'l Ass'n of Machinists and Aerospace Workers, 127 L.R.R.M. 3213 (9th Cir. Mar. 30, 1988) 2, 3, 4

United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc., 108 S. Ct. 364 (1987) ..... *passim*

United States Postal Service v. American Postal Workers Union, AFL-CIO, 736 F.2d 822 (1st Cir. 1984) 4

United States Postal Service v. National Ass'n of Letter Carriers, AFL-CIO, 839 F.2d 146 (3rd Cir. 1988) 2

Statutes

Federal Aviation Act

49 U.S.C. § 1302(a)(2) 4

49 U.S.C. § 1421 5

Federal Aviation Regulations

14 C.F.R. § 61.53 5

14 C.F.R. § 91.11 5

14 C.F.R. § 121.413(a)(4)(ii) 6

Articles

O'Brien, *Deregulation and Safety: ALPA's Perspective*, AIRLINE PILOT, Aug. 1987 5

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Petitioner Northwest Airlines, Inc., submits this supplemental brief in support of its petition for a writ of certiorari and in response to the supplemental opposition filed on May 6, 1988, by respondent Air Line Pilots Association ("ALPA").

1. ALPA recognizes (Supp. Opp. at 3) that the Court in *United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc.*, 108 S. Ct. 364 (1987), expressly declined to rule on the very issue presented in this case: whether "a court may refuse to enforce an award on public policy grounds only when the award itself violates a statute, regulation, or other manifestation of positive law, or compels conduct by the employer that would violate such a law." *Misco*,

108 S. Ct. at 374-75 n.12. The continuing conflict among the courts of appeals both before and since the ruling in *Misco* plainly illustrates that the need for guidance on the pubilc policy exception is greater than ever.

In *Misco*, this Court noted that the Ninth and the District of Columbia Circuits take an extremely narrow view of the judicial power to decline enforcement of arbitral awards on public policy grounds, while the First and Seventh Circuits take a less restrictive approach. *Misco*, 108 S. Ct. at 369 n.7.

In the wake of *Misco*, the lower courts have expressed uncertainty about the scope of the "public policy" exception. In *United States Postal Service v. National Ass'n of Letter Carriers, AFL-CIO*, 839 F.2d 146, 150 (3rd Cir. 1988), for example, although the court of appeals upheld an arbitrator's reinstatement of a postal employee who shot at his supervisor's car, the court expressly declined to reach the question "how narrow the limits of the scope of review of a collective-bargaining arbitration decision are," despite urgings from both parties. *See also S.D. Warren Co. v. United Paperworkers' Int'l Union*, (1st Cir. April 21, 1988, No. 86-1405 LEXIS) (court avoided reaching the public policy exception by instead ruling on whether the arbitrator had exceeded her authority).

Some courts have tried to resolve the question and have reached conclusions at odds with those of other circuits. In *Stead Motors of Walnut Creek v. Automobile Machinists Lodge No. 1173, Int'l Ass'n of Machinists and Aerospace Workers*, 127 L.R.R.M. 3213 (9th Cir. Mar. 30, 1988), for instance, the court of appeals affirmed a decision to overturn an arbitration award to reinstate an auto mechanic who had recklessly failed to tighten lug bolts on a customer's automobile, thereby endangering the car's driver and passengers. Both the district court and the court of appeals found that the arbitrator's decision violated a well-defined, dominant public policy of the

State of California.[1] Although this Court previously identified the Ninth Circuit as having adopted the more restrictive view toward the public policy exception, it is hard to imagine such a result if a restrictive view, as adopted by the District of Columbia Circuit in this case, was in fact applied in *Stead Motors*. Thus, the Ninth Circuit case law may be internally inconsistent, even after *Misco*.

In a post-*Misco* case of remarkable similarity to this case, the Eighth Circuit affirmed a decision to vacate an arbitrator's reinstatement of a nuclear power plant employee who had deliberately violated a federally-mandated safety regulation and company safety policy. *Iowa Electric Light and Power Co. v. Local Union 204, Int'l Brotherhood of Electrical Workers*, 834 F.2d 1424 (8th Cir. 1987). The company had discharged the employee after learning that he had intentionally flouted safety regulations at a nuclear power plant. Expressly rejecting the District of Columbia Circuit's view, the court of appeals held that it was "not required to find that the award itself is illegal before we overrule the arbitrator on public policy grounds." *Iowa Electric, supra*, 834 F.2d at 1427 n.3. The Eighth Circuit placed great emphasis on the special need for nuclear plant operations to protect the safety of the public and on the federal statute mandating such a safety priority. *See also Hyde Park Community Hospital v. Allied Services Division*, (N.D. Ill. Dec. 23, 1987, No. 87 C 1315 LEXIS) (reversing an arbitration award that conditioned reinstatement on the denial of union office for one year, holding that the award contravened the public policy expressed by an act of Congress governing union democracy).

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[1] The court found the public policy in California's Vehicle Code, which made unlawful the operation of any vehicle in an unsafe condition, and in legislation associated with the California Bureau of Automotive Repair.

Cases like *Iowa Electric*, *Stead Motors* and *Hyde Park*—as well as *United States Postal Service v. American Postal Workers Union, AFL-CIO*, 736 F.2d 822 (1st Cir. 1984)—are fundamentally at odds with the unique, highly restrictive approach of the District of Columbia Circuit expressed in the opinion below. There is a need for this Court to resolve the question.

2. ALPA claims, however, that this case is inappropriate for certiorari because the FAA granted First Officer Larry Morrison a medical certificate even after he flew while intoxicated. Unlike typical discharge arbitrations involving workplace safety, however, the "party" who will bear the ultimate consequences of the arbitral decisions in this case is the travelling public. Moreover, unlike the typical discharge case, the employer in this case was acting pursuant to an express mandate. The Federal Aviation Act imposes a specific obligation on each air carrier—independent of any obligations imposed on the FAA—to maintain the highest degree of air safety. 49 U.S.C. § 1302(a)(2). (*See* Pet. at 17) The arbitral award in this case interferes with and undermines Northwest's ability to fulfill that obligation and, therefore, violates the explicit public policy embodied in the Act.[2]

3. ALPA now asserts the arbitrator "found as a factual matter that [Morrison] could be trusted to return to flying without endangering air safety." (Supp. Opp. at 2) There is, however, no such explicit finding in the arbitrator's opinion, which simply states:

> "Inasmuch as the Federal Air Surgeon has the statutory authority to make such determinations [recovery from alcoholism] and must do so with the highest regard for air safety, the Chairman is of

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[2] Moreover, as we argue in the Petition, the Federal Aviation Act's mandate deprives the arbitrator of authority to overrule Northwest's safety policies. (*See* Pet. at 19-22)

> the opinion that the Award herein is consistent with public policy and within the Board's authority to make." (Pet. App. at 75a)

The arbitrator, as well as the court below, ignored the statutory obligation that the Federal Aviation Act imposes on air carriers. Moreover, the FAA regulations that the court of appeals and the arbitrator relied upon are *minimum* standards for *medical* certification of airmen.[3] *See* 49 U.S.C. § 1421. This case, however, is not a medical discharge case. The mere fact that the FAA reissued a medical certificate to Morrison should not obscure the undisputed facts in this case:

- Morrison violated a specific FAA regulation prohibiting flight crewmembers from flying "within 8 hours after the consumption of any alcoholic beverage." 14 C.F.R. § 91.11.
- Morrison violated a specific FAA regulation prohibiting flight crewmembers from flying "while under the influence of alcohol." 14 C.F.R. § 91.11.
- Morrison violated a specific FAA regulation prohibiting flying while subject to "a known medical deficiency." 14 C.F.R. § 61.53.
- Morrison violated Northwest's rule prohibiting consumption of alcohol within 24 hours of a flight. (Pet. App. at 54a)

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[3] ALPA has elsewere also admitted that the FAA sets only minimum standards, and in fact ALPA has defined an acceptable margin of safety as being "the difference between the minimum standards set by FAA and the higher, self-imposed standards of the airlines achieved through the cooperative efforts of pilots and management." O'Brien, *Deregulation and Safety: ALPA's Perspective*, AIRLINE PILOT, Aug. 1987, at 16. In that same article, ALPA recognized a carrier's responsibility to comply with the federal aviation regulations "and to provide the highest possible degree of aviation safety." *Id.* at 19. Furthermore, ALPA does not challenge a recent finding that FAA inspector staffing is inadequate "to accommodate overall responsiveness and responsible certificate administration." *Id.* at 20. (*See also* Reply at 3)

- Morrison admitted that "he probably had violated the 24-hour rule before." (Pet. App. at 53a)

Northwest discharged Morrison because his violations of federal law and company rules endangered the lives of 79 people aboard a Northwest passenger jet on August 1, 1982, and demonstrated that Morrison does not possess the judgment and sense of responsibility Northwest requires of its pilots. The FAA's medical certification procedures do not purport to determine the overall fitness of a pilot. That determination is vested by law exclusively in the air carrier. *See* 14 C.F.R. § 121.413(a)(4)(ii).[4]

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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[4] In *Iowa Electric, supra*, the court distinguished the instant case by noting in passing that the arbitrator's award in Morrison's case "was based on the pilot's recertification" by the FAA. 834 F.2d at 1429. (In *Iowa Electric*, the Nuclear Regulatory Commission had approved the employee's termination.) The court of appeals, however, failed to recognize that FAA standards are *minimum* requirements, and that airlines have an obligation at times to go beyond those minimum standards to ensure they meet their independent statutory obligation of maintaining the highest degree of safety.